Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Petitioner,

v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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43 pp

Question Presented

Whether P.L. 86-272, 15 U.S.C. § 381 (1994), exceeds the power of Congress to "regulate commerce" under the Commerce Clause or violates principles of federalism embodied in the Tenth Amendment to the United States Constitution, by substantially impairing the right of a State to impose a non-discriminatory and fairly apportioned tax on interstate commerce within its borders.

Parties to the Proceeding

The plaintiff-respondent is National Private Truck Council, Inc. The defendant-petitioner is the Commissioner of Revenue of the Commonwealth of Massachusetts.

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COMMISSIONER OF REVENUE OF MASSACHUSETTS,
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v.

NATIONAL PRIVATE TRUCK COUNCIL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, defendant Massachusetts Commissioner of Revenue requests that the Court issue a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts entered on December 22, 1997.

OPINIONS BELOW

The opinion of the Supreme Judicial Court is reported at 426 Mass. 324 and 688 N.E.2d 936 (1997) and is reproduced in the Appendix hereto. The decision of the Massachusetts Superior Court is not reported but is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on December 22, 1997. No rehearing was sought. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a)(1994). In light of the fact that petitioner has drawn into question the constitutionality of an Act of Congress, and neither the United States nor any federal department, office, agency, officer, or employee is a party, 28 U.S.C § 2403(a) (1994) may apply, and petitioner has accordingly notified the Solicitor General of the United States of this petition, as required by U.S. Supreme Court Rule 29.4(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States . . . .

United States Constitution Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Public Law 86-272,
15 U.S.C. § 381 (1994)

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to -

> (1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Mass. Gen. Laws Ann. ch. 63, § 39
(West 1997 Supp.)

Except as otherwise provided herein, every foreign corporation, exercising its charter, or qualified to do business or actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay, on account of each taxable year, the excise provided in subsection (a) or (b) of this section, whichever is greater.

The excise levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within the commonwealth in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

> (2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.
>
> (3) The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.
>
> It is the purpose of this section to require the payment of this excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the Commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. . . .

STATEMENT OF THE CASE

Prior Proceedings

In this action National Private Truck Council (NPTC) claims that a regulation issued by the Massachusetts Commissioner of Revenue is preempted by Public Law 86-272, 15 U.S.C. § 381. The Massachusetts regulation, 830 Code of Massachusetts Regulations (C.M.R.) § 39.1(5)(a) (1993), applies the Massachusetts corporate excise tax to foreign (non-Massachusetts) corporations that sell tangible personal property to customers in Massachusetts and deliver such property to their customers in trucks owned or leased by such corporations or their affiliates. Public Law 86-272 purports to limit the authority of the States to tax such interstate commerce, even

where the State tax is non-discriminatory, fairly apportioned, and based on a substantial nexus between the taxpayer and the taxing state.

The Massachusetts Superior Court decided the case on cross-motions for summary judgment, affidavits, and a statement of agreed facts. Pet App. 2. The court held that the Regulation was preempted by P.L. 86-272, to the extent that it imposed a tax on companies that did no more than solicit orders in Massachusetts and deliver the ordered goods to customers there in company-owned trucks. *Id.* The court rejected the Commissioner's claim that P.L. 86-272 is an unconstitutional limit on the authority of a State to impose a non-discriminatory and fairly apportioned tax on interstate commerce within its borders. *Id.*

The Massachusetts Supreme Judicial Court affirmed. Pet. App. 2. On the constitutional issue, the court stated that "Congress's plenary power to regulate interstate commerce is well established . . . [and,][c]onsistent with this power, Congress can prohibit States from imposing taxes that interfere with interstate commerce." *Id.* at 7 (citations omitted). The court described P.L. 86-272 as "a uniform minimum standard which must be met before a State may tax interstate commerce." Pet. App. 8 (citations omitted). "This," the court concluded, "is clearly within the ambit of Congress's commerce power." *Id.* (citations omitted).

Statement of Facts

The material facts in this case were stipulated or not disputed below. Pet. App. 2. The Commissioner is the Massachusetts official authorized to administer and enforce the state's tax laws. M.G.L.A. ch. 14, §§ 1-3 (West 1994);

M.G.L.A. ch. 62C, § 3 (West 1988). Among his duties is the enforcement of the corporate excise imposed on foreign corporations doing business in Massachusetts by M.G.L.A. ch. 63, § 39. "The Commissioner may prescribe regulations and rulings, not inconsistent with law, to carry into effect the provisions of . . . [M.G.L.A. ch. 63, § 39] . . . ." M.G.L.A. ch. 62C, § 3.

The Regulation at issue exempts non-Massachusetts corporations from the excise tax

> if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts.

803 C.M.R. § 63.39.1(5)(a).

NPTC is "the national trade association representing the interests of approximately 1,000 corporations . . . that operate truck fleets in support of their respective business activities." R.A. 92. "NPTC's members include large fleets operated by Fortune 500 companies as well as the small fleets of local businesses." R.A. 93. "They operate virtually every type of trucking equipment, including tractor-trailer combinations, tank trailers, and forty-eight or fifty-three foot long trailers, and straight trucks used in local delivery operations by businesses such as bakeries and dairies." R.A. 93. NPTC members distribute their goods nationwide or in a multistate area. *Id.*

The parties stipulated that some NPTC members (including both parent companies and trucking subsidiaries) regularly transport their goods from points outside Massachusetts to Massachusetts in vehicles owned or leased by them. R.A. 94. Some members do so at least eight days per month. *Id.* Some members also pick up goods in Massachusetts and deliver them outside Massachusetts. *Id.* Two foreign companies that have invoked P.L. 86-272 and claim the same immunity claimed by NPTC transport goods to Massachusetts in company trucks more than 300 days per year. R.A. 98-99.

The record also includes undisputed evidence about the impact of P.L. 86-272 on the collection of state taxes on interstate commerce. An affidavit of a Massachusetts tax official states that for fiscal years 1993 and 1994, the Department of Revenue assessed taxes or notices of intention to assess taxes in 1,580 cases in which taxpayers invoked P.L. 86-272, totaling $29,578,207. R.A. 43-44.

REASONS FOR GRANTING THE WRIT

Public Law 86-272 represents the "first time in our history" that Congress "enacted general legislation restricting the powers of the States to tax interstate business." J. & W. Hellerstein, *State Taxation,* Vol. I, ¶ 6.10 at 6-23 (2d ed. 1993). As discussed below, later federal statutes have restricted certain state taxes in other circumstances, *e.g.*, to prevent discrimination, promote fair apportionment, or protect federal employees or instrumentalities. However, P.L. 86-272 arguably stands alone as a general prohibition on a non-discriminatory, fairly apportioned state tax that otherwise satisfies the Constitution. This Court has never considered the

constitutionality of P.L. 86-272. The Supreme Judicial Court has accordingly "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." United States Supreme Court Rule 10(c).[1]

I. THE CONSTITUTIONALITY OF P.L. 86-272 IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. *Public Law 86-272 Nullifies the Right of the States to Impose Non-Discriminatory, Fairly Apportioned Taxes on Interstate Commerce Within Their Borders.*

Public Law 86-272 nullifies the right of the States to impose a tax on interstate commerce where that tax is concededly non-discriminatory and fairly apportioned and is based on constitutionally adequate contacts between the taxpayer and the taxing State.

The history and terms of P.L. 86-272 show its dramatic purpose and effect. The statute was enacted in response to three

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[1] Massachusetts does not seek a writ of certiorari on that part of the judgment below that held that P.L. 86-272 preempts Massachusetts from imposing its corporate excise tax on companies that do no more than solicit orders in Massachusetts and deliver the ordered goods to customers there in company-owned trucks. On that issue, the decision of the Supreme Judicial Court is consistent with the decision in *Commonwealth of Virginia, Dep't of Taxation v. National Private Truck Council*, 480 S.E.2d 500 (Va. 1997). *See* Pet. App. 5-6.

decisions of this Court in 1959. Prior to 1959, there was considerable doubt whether a State could tax a foreign corporation solely on the basis of its solicitation of orders for its products in the taxing State. In 1959, however, the Court held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452 (1959). While *Northwestern States* involved state taxation of a corporation whose activities in the taxing State exceeded solicitation, the Court's denial of review of two Louisiana decisions raised concerns among businesses that the quoted language from *Northwestern States* would permit state taxation of out-of-state corporations on the basis of mere solicitation in the taxing State. Both *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So.2d 70 (La. 1958), *appeal dism'd*, 359 U.S. 28 (1959), and *International Shoe Co. v. Fontenot*, 107 So.2d 640 (La. 1958), *cert. denied*, 359 U.S. 984 (1959), involved Louisiana decisions upholding state net-income taxes on out-of-state corporations whose activities in Louisiana were limited to the solicitation of orders. *See generally Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 220-221 (1992). Congress "promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated" by *Northwestern States* by enacting P.L. 86-272 within seven months of the decision. *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279-280 (1972)(quoting S. Rep. No. 658, 86th Cong., 1st Sess., 2; H.R. Rep. No. 936, 86th Cong., 1st Sess., 1).

Supporters of P.L. 86-272 admitted that they sought to relieve companies from the "heavy cost of compliance" with state tax laws. S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2550. They feared that, after *Northwestern States*, more States would "devise a formula of apportionment to tax the income of businesses carrying on interstate commerce exclusively." S. Rep. No. 658, 1959 U.S.C.C.A.N. at 2551. They "believe[d] that, unless some certainty [was] restored to this area, the economic implications for the economy of the entire Nation may be unfortunate." *Id.* at 2550. Opponents of the bill, on the other hand, criticized it as a "direct invasion" of the right of the States to raise revenue from commerce within their borders. *Id.* at 2558. Supporters of P.L. 86-272 responded that their action was a "stopgap or temporary solution" subject to further study. S. Rep. No. 658, 4-5, 1959 U.S.C.C.A.N. at 2551.

Twenty years later, the Court reviewed the same legislative history and stated that P.L. 86-272 "was designed to define clearly the lower limit for the exercise of [the State's power to tax interstate commerce]." *Heublein*, 409 U.S. at 280. Twenty years after *Heublein*, in 1992, the Court in *Wrigley* noted the continuing litigation over the phrase "solicitation of orders." 505 U.S. at 223-231. Neither *Wrigley* nor *Heublein*, however, considered the constitutional question posed by the "direct invasion" made by P.L. 86-272 of the vital state function of taxation. This petition presents that important question.

B. *Public Law 86-272 Exceeds Congress's Power Under the Commerce Clause and Violates the Tenth Amendment Because It Unduly Restricts the Power of the States to Impose Non-Discriminatory and Fairly Apportioned Taxes on Interstate Commerce Within Their Borders.*

Public Law 86-272 unconstitutionally impairs the power of the States to tax interstate commerce within their borders. The statute represents the "first time in our history" that Congress "enacted general legislation restricting the powers of the States to tax interstate business." J. & W. Hellerstein, *State Taxation*, Vol. I, ¶ 6.10 at 6-23 (2d ed. 1993). Subsequent federal statutes have restricted certain state taxes in very different circumstances, *e.g.*, to prevent discrimination, ensure fair apportionment, or protect federal employees or instrumentalities. However, P.L. 86-272 arguably stands alone as a general prohibition on a tax that is non-discriminatory, fairly apportioned, and based on a constitutional nexus between the taxpayer and the taxing State.

The Court has never considered the constitutionality of P.L. 86-272. Shortly after the enactment of P.L. 86-272 in 1959, three state courts upheld its constitutionality, but none considered the same constitutional claim made here. *International Shoe Co. v. Cocreham*, 164 So.2d 314 (La.), *cert. denied*, 379 U.S. 902 (1964), focused on the relationship between the act and interstate commerce and did not address the question whether there exists some limit to Congress's authority to restrict state taxation. The second case, *State ex. rel. CIBA Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645, 655-557 (Mo. 1964), likewise addressed whether

P.L. 86-272 constitutes the "regulation of commerce" and whether Congress could have reasonably found the burden imposed by the state taxes to be "undue." The third case, *Smith Kline & French Laboratories v. State Tax Comm'n*, 403 P.2d 375 (Or. 1965), rejected claims that (1) P.L. 86-272 is an "unconstitutional attempt by Congress to adopt new rules of nexus under the authority of the Commerce Clause, or violates due process by usurping the power of the judiciary . . ." and that (2) Congress lacked power to act because "*Northwestern* had upheld the state tax at issue." *Id.* at 378-379 (reversing the Oregon Tax Court, which had held P.L. 86-272 unconstitutional, *see* 1964 WL 134 (Or. Tax Ct.)). None of these courts directly addressed the claim here: that P.L. 86-272 violates the Constitution because it unduly impairs the authority of the States to impose a non-discriminatory, fairly apportioned tax on interstate commerce within their borders.

For more than two hundred years, the Court has resolved "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *New York v. United States*, 505 U.S. 144, 155 (1992). "These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I . . . ." *Id.* "In other cases, the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment." *Id.* (citations omitted). "Either way," the principal question is whether the challenged Act "oversteps the boundary between federal and state authority." *Id.* at 159; *see United States v. Lopez*, 514 U.S. 549, 578, 580, 581 (1995) (Kennedy, J., concurring)(federal statute invalid if it "tips the scales too far" or "contradicts the federal balance").

Three factors show why P.L. 86-272 oversteps the constitutional boundary between federal and state power: (1) P.L. 86-272 restricts -- and thus implies the right to destroy -- the power of taxation, a power that lies at the core of the sovereignty of each State; (2) the restriction on state taxes imposed by P.L. 86-272 is substantial; and (3) P.L. 86-272 exceeds the scope of every other federal law that purports to restrict state taxation.

First, this Court has said that "[t]he power of taxation is fundamental to the very existence of the government of the States." *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527, 537 (1931); *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-199 (1824).[2] Even a strong proponent of the Constitution admitted that "the individual States would . . . retain an independent and uncontrollable authority to raise revenues to any extent of which they may stand in need by every kind of taxation except duties on imports and exports." *The Federalist*, No. 33 (A. Hamilton) at 205 (C. Rossiter ed. 1961).

More recently, both *McKesson v. Division of Alcohol, Beverages & Tobacco*, 496 U.S. 18, 37 n. 19 (1990), and *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 102 (1981), have emphasized that "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all

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[2] These statements echo the courts of Great Britain regarding an earlier form of sovereignty: "As it is not a kingdom without subjects, so he is not a king without revenues." *An Information Against Bates*, Lane's Reports 23, 145 English Reports (Exchequer) 267 (1606).

of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *McKesson*, 496 U.S. at 37 n. 19 (*quoting Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)); *see also Arkansas v. Farm Credit Services*, 117 S. Ct. 1776, 1780 (1997). These cases make clear that P.L. 86-272 restricts a power that is vital to the existence of the States and thus "intrude[s] upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

Second, the restriction imposed by P.L. 86-272 is substantial. The statute applies to "a net income tax on the income derived within [the] State by any person from interstate commerce . . ." if the person is engaged in the "sale[] of tangible personal property" and limits his activities to those set forth in the statute. 15 U.S.C. § 381(a). The affidavit of a Massachusetts tax official details the fiscal impact of the statute. R.A. 43-44. The affidavit states that, for fiscal years 1993 and 1994, the Department of Revenue assessed taxes or issued notices of intention to assess taxes in 1,580 cases in which the taxpayer invoked P.L. 86-272, totaling $29,578,207. *Id.* These undisputed figures show that P.L. 86-272 significantly affects the collection of corporate excise taxes otherwise permitted by federal constitutional law. In taxing the apportioned net income of these firms, Massachusetts merely seeks "some compensation for facilities and benefits afforded by [it] to income producing activities therein, whether those activities be altogether local or in furtherance of interstate

commerce." *Northwestern States Portland Cement*, 358 U.S. at 469 (Harlan, J., concurring).[3]

Nor are the substantial effects of P.L. 86-272 confined to Massachusetts. *See Wrigley*, 505 U.S. at 224-228 & n. 2 (citing conflicting lower court cases construing term "solicitation"). The application of the statute even after *Wrigley* produces constant litigation. *See, e.g., Commissioner of Revenue v. Kelly-Springfield Tire Co.*, 419 Mass. 262, 643 N.E.2d 458 (1994); *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39, 686 N.E.2d 436 (1997), *petition for cert. pending*, U.S. Sup. Ct. No. 97-1242. Thus, in enacting P.L. 86-272, Congress has restricted broad state taxes applicable to hundreds -- if not thousands -- of corporations doing business in each of the States. This substantial invasion of the taxing power unconstitutionally disturbs the federal-state balance.

Third, P.L. 86-272 exceeds the scope of every other federal law that restricts state taxation, in that it denies to each State the ability to impose a non-discriminatory, fairly apportioned net income tax on interstate commerce within its borders. The precedent established by P.L. 86-272 was well apparent to the senators who opposed the bill in 1959. They noted that the States "have a vital role in our total government" and that the bill "[took] away from the States powers which [they] h[ad] . . . [and] would constitute an unwise precedent of congressional

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[3] Public Law 86-272 also undermines the fairness and uniformity sought by the States in the application of their tax laws. For example, the effect of P.L. 86-272 in this case is to exempt the members of NPTC from tax while taxing interstate common carriers of goods who perform identical trucking functions in Massachusetts but are not covered by P.L. 86-272 because they do not solicit orders there.

power and statutory rights of States by curtailing the ability and choice of the States to raise sufficient revenue to carry out proper and necessary State functions." 1959 U.S.C.C.A.N. at 2557. Without sufficient revenue, the opponents predicted, the States "must become powerless wards of the National Government." *Id.* at 2558. These predictions echoed *The Federalist* No. 33, in which Hamilton stated that "a law abrogating or preventing the collection of a tax laid by the authority of a state (unless upon imports and exports) would not be the supreme law of the land, but a usurpation of power, not granted by the constitution." *The Federalist* No. 33 (A. Hamilton) at 205 (C. Rossiter ed. 1961).

The usurpation of power feared by Hamilton is particularly grave here, because P.L. 86-272 exceeds the scope of every other federal law that purports to restrict state taxation. For example, the Railroad Revitalization and Regulatory Reform Act of 1975, Pub. L. No. 94-210, § 306, 90 Stat. 31, 49 U.S.C. § 11503(b)(4)(4-R Act), merely prohibits States from taxing railroad property more heavily than other industrial and commercial property. *See Dep't of Rev. of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 336 (1994); *State of Arizona v. Atchison, Topeka, and Santa Fe Railroad Co.*, 656 F.2d 398, 400, 406-410 (9th Cir. 1981)(upholding constitutionality of 4-R Act). The 4-R Act was intended soley to address concerns about discrimination against interstate commerce. *See ACF Industries, Inc.*, 510 U.S. at 336. Similarly, while 49 U.S.C. § 40116 (1994) (formerly 49 U.S.C. App. § 1513(d)(1)(A)-(C)), restricts state taxes on property used in air transportation, *see Aloha Airlines v. Director of Taxation of Hawaii*, 464 U.S. 7, 8-10, 14 n. 10 (1983); *Western Airlines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 124-26 (1987), the same statute permits a State to impose property taxes, net

income taxes, franchise taxes, and sales and use taxes with respect to air transportation. 49 U.S.C. § 40116(f)(1994).

Congress has similarly acted to prohibit discriminatory taxation of the utility industry. The Tax Reform Act of 1976, Pub. L. No. 94-455, § 2121(a), 90 Stat. 521, 15 U.S.C. § 391 (1994), prohibits States from imposing a tax on the generation or transmission of electricity which discriminates against out-of-state producers or consumers. *See Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 146 (1979). The dangers of discrimination against out-of-state interests also likely animated the Supreme Court's statement in *Moorman Mfg. Co. v. Blair*, 437 U.S. 267 (1978), that Congress could act to "require all states to adhere to uniform rules for the division of income." *Id.* at 280. This subject of apportionment is closely related to the question of discrimination against interstate commerce, and the Court in *Moorman* was aware of the recent federal statutes prohibiting discriminatory state taxation. Each of these federal statutes reflects the fact that restraints imposed by the dormant Commerce Clause on the power of a State to tax are principally those that ensure that States will not erect economic barriers to interstate competition. *H.P. Hood & Son v. DuMond*, 336 U.S. 525, 532-534 (1949) (distinguishing between economic protectionism and States' authority to manage their "internal affairs").[4]

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[4] *Quill Corp. v. North Dakota*, 504 U.S. 298, 316-319 & nn. 9-11 (1992), and other cases concerning the constitutionality of certain state taxes under the Commerce Clause suggest that Congress has some authority to regulate state taxes. Of course, the fact that Congress has *authorized* certain state taxation that would otherwise violate the Commerce Clause, *see, e.g.*, *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946),

Congress has also restricted state taxes that might impair constitutional protections for federal obligations, instrumentalities, and the income of federal employees. *See* 4 U.S.C. § 111 (1994)(banning discriminatory taxes on income of officers and employees of United States); 31 U.S.C. § 3124 (1994)(restricting state taxes on United States obligations, but exempting non-discriminatory franchise and similar taxes); Through these statutes -- like the statutes banning discrimination against interstate commerce -- Congress has codified constitutional immunities against particular forms of state taxation.[5]

Public Law 86-272, however, goes well beyond the other federal statutes that restrict state taxation. Public Law 86-272 denies the States the right to impose a non-discriminatory, fairly apportioned net income tax on interstate commerce, based solely on the congressional judgment that the costs of compliance and other burdens on interstate commerce outweigh the interests of the States. Supporters of P.L. 86-272 admitted that they sought

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does not mean that Congress may *restrict* state taxation. To the extent that the Court has suggested that Congress has the power to restrict state taxation, it has not explained the constitutional *limits* on such a power. This petition presents an ideal case to describe those limits.

[5] These statutes also show why cases such as *Southeastern Pa. Trans. Auth. v. Pennsylvania Pub. Util. Comm'n*, 826 F. Supp. 1506, 1520-1521 (E.D. Pa. 1993), cited by the court below, are distinguishable. These cases concern federal acts intended to protect instrumentalities created by federal law, such as the Consolidated Rail Corporation and the Amtrak Commuter Services Corporation.

to relieve companies from the "heavy cost of compliance" with state tax laws. 1959 U.S.C.C.A.N. at 2550. Yet the catalyst for the Act -- *Northwestern States* -- had made clear that the state taxes at issue did "not discriminate against *nor subject either corporation to an undue burden*." 358 U.S. at 461-462 (emphasis added). A mere finding of an "undue burden" on interstate commerce is a far weaker basis for a federal restriction on state taxation than discrimination against interstate commerce or a tax on federal instrumentalities or employees. Where there is no question of discrimination against interstate commerce and a State satisfies all other constitutional requirements for a tax, the Tenth Amendment reserves to the States the power to tax their apportioned share of such commerce, free from Congressional regulation. *Cf. Heublein*, 409 U.S. at 284 (Blackmun, J., concurring)(States' power to regulate alcoholic beverages under Twenty-First Amendment "overrides what would otherwise be proscribed by 15 U.S.C. 381"); *In Re Brentwood Outpatient, Ltd.*, 43 F.3d 256, 264 (6th Cir. 1994)("constitutional question" would be presented "were Congress to legislate that a bankruptcy court has the power to void all state tax claims once a debtor files for bankruptcy"), *cert. denied*, 514 U.S. 1096 (1995); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 679 F.2d 1307, 1313 (9th Cir. 1982) (Tang, J., dissenting) ("finding of [ERISA] preemption" of state tax would "pose a serious obstacle" to State's tax power, "casting doubt on [federal law's] constitutionality").

Without a meaningful limit on congressional power to restrict state taxation, a vital function of the States would be in grave danger. If Congress can restrict a fairly apportioned, non-discriminatory tax on interstate commerce, it could prohibit it altogether. If Congress may prohibit taxes on interstate

commerce, it could prohibit a tax on *intra*state commerce that "affects" interstate commerce. Similarly, if Congress may enact P.L. 86-272, it could prohibit state taxes on particular industries. *See* H. 1054 (1997) (Internet Tax Freedom Act). Thus, the power to restrict state taxes may become the power to destroy them. This petition presents the Court with an ideal case to determine the limits of this dangerous Congressional power.

Finally, cases concerning "direct" taxes further show that the Constitution does not permit the nullification of otherwise constitutional state taxes. Congress may not impose a direct tax on a "State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands . . . ." *New York v. United States*, 326 U.S. 572, 587 (1946)(Stone, C.J., concurring). Such a federal tax may "so affect the State . . . as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* "[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers. Limitation[s] cannot be so varied or extended as seriously to impair *either the taxing power of the government imposing the tax* . . . or the appropriate exercise of the functions of the government affected by it." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-524 (emphasis added). These cases provide further support for the conclusion that the federal government may not unduly limit the taxing power of the States.

In sum, the Framers did not intend that the laying of otherwise constitutional state taxes should be subject to the "by-your-leave " of Congress. The Act impairs a power that lies at the core of the sovereignty of the States. For these reasons, it

exceeds the power of Congress under the Commerce Clause and violates the Tenth Amendment.[6]

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[6] The unconstitutionality of P.L. 86-272 does not undermine preemption principles. Congress may preempt the exercise of state regulatory authority, but "taxes are not regulations in any sense of that term." *Northwestern States*, 358 U.S. at 461. Taxes lie at the core of state sovereignty, and may not be nullified by Congress, at least not the same extent as P.L. 86-272.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

MASSACHUSETTS COMMISSIONER
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